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IN THE

Supreme Court Of The United States

No. 279

RAYMOND T. DAVIS, - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY, - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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INDEX

	PAGES
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	2–3
Statement	3–4
How Federal Questions Were Raised	4
Reasons for Granting the Writ	4–6
Conclusion	6
Appendix A:	
Opinion of the Court of Appeals of Kentucky	1a–8a
Appendix B:	
Kentucky Revised Statute 434.130	9a
Constitution of the United States, Amendment Six	9a
Constitution of the United States, Amendment Fourteen, Section 1	9a

CITATIONS

Authorities:	
23 Am. Jur. 696, Section 46	5
174 ALR 1329	6
Statutes:	
28 U.S.C., Section 1257 (3)	2
Constitution of the United States, Amendment Six	2, 3
Constitution of the United States, Amendment Fourteen, Section 1	2, 3
Kentucky Revised Statutes, Section 434.130	2

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May it please the Court:

Petitioner, Raymond T. Davis, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Kentucky entered in the above-styled case on the 23rd day of May, 1966. This judgment affirmed a conviction of petitioner in the Jefferson Circuit Court for the offense of uttering a forged instrument in writing wherein his punishment was prescribed at confinement in the penitentiary for a period of two (2) years.

This is the first attempt by petitioner to seek relief in this Court.

OPINION BELOW

The opinion of the Court of Appeals of Kentucky is reported in Ky. 309 S.W. 2d 711, and is presented to this Court in Appendix A attached hereto.

JURISDICTION

The opinion of the Court of Appeals of Kentucky was rendered on the 15th day of October, 1965, and a Petition for Rehearing was overruled on the 23rd day of May, 1966.

The jurisdiction of the Court is invoked under 28 U.S.C., Section 1257 (3), since the Commonwealth of Kentucky has infringed rights, privileges and immunities specially set up and claimed under the Constitution of the United States.

QUESTION PRESENTED

Were the petitioner's rights guaranteed him by the Sixth and Fourteenth Amendments of the Constitution of the United States prejudiced by an indictment which failed to inform him of the nature of the accusation against him and which was in substantial variance with the proof introduced at the trial?

STATUTES INVOLVED

Petitioner was convicted of the offense of uttering a forged instrument in writing under Kentucky Revised Statutes 434.130, and his punishment was fixed

at confinement in the penitentiary for a period of two (2) years.

Amendment Six, and Amendment Fourteen, Section 1, of the Constitution of the United States.

The foregoing are set forth in Appendix B, infra.

STATEMENT

The petitioner was indicted for the offense of uttering a forged instrument in writing in the amount of Twenty-Nine Thousand Five Hundred ($29,500.00) Dollars and payable to the Citizens Fidelity Bank and Trust Company of Louisville, Kentucky.

The proof revealed without contradiction that the petitioner had previously entered into the Health Food Business with Mr. and Mrs. W. Ray Stark and that these parties had from time to time jointly executed promissory notes with banks other than Citizens in order to finance the business venture.

Subsequent to these events, the Citizens Bank agreed to pay off the previously existing loans at the various other banks and consolidate all of the indebtedness of the parties into one loan at Citizens. For this purpose the petitioner was furnished a blank promissory note form which he subsequently delivered to the Citizens Bank, completely blank, except for the signatures of the petitioner, his wife, and Mr. and Mrs. Stark. It was the signatures of Mr. and Mrs. Stark on this note which were alleged to be forgeries and which were the subject matter of the indictment.

As a result of this transaction with Citizens, all other banks were paid in full and the notes were cancelled. It was undenied that this entire transaction did not alter or enlarge the original and existing obligation of the Starks and it is equally undenied that the petioner received no money or property from this transaction and that indeed, he did not even seek to do so.

HOW FEDERAL QUESTIONS WERE RAISED

The constitutional guarantees secured by the Sixth and Fourteenth Amendments to the Constitution of the United States were implicitly raised by the proceeding in the lower court in which the petitioner was forced to trial under an indictment which did not inform him of the nature and cause of the accusation against him.

The petitioner, in his motion for a new trial and again before the Court of Appeals of Kentucky, raised the question concerning the violation of the petitioner's right to due process of law and equal protection of the law by reason of the misleading and erroneous allegations of the indictment which were in substantial variance with the proof introduced at the trial.

REASONS FOR GRANTING THE WRIT

The Sixth Amendment of the United States Constitution requires that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation against him. In the case at bar it was

undisputed that the indictment incorrectly and erroneously alleged that the defendant uttered "a forged note in the sum of $29,500.00 payable to Citizens Fidelity Bank and Trust Company".

It is equally undisputed that at the time of its utterance the note in question was completely blank in every particular with the exception of the signatures of the makers.

It is also undisputed that even when this blank note was subsequently completed by an official of the bank, and not in the presence of the petitioner, the amount actually paid was $25,208.75 and not $29,500.00 as alleged in the indictment.

It should parenthetically be observed that the petitioner did not receive or seek to receive any of this money and that Mr. and Mrs. W. Ray Stark did not suffer any financial loss as a result of this transaction. Under these factual circumstances, the authorities which have considered the question are virtually unanimous in holding that extrinsic facts and circumstances must be alleged in an indictment which has as its subject a note void on its face.

In 23 Am. Jur. 696, Sec. 46, it is stated:

> " * * * the extrinsic facts in view of which it is claimed that the instrument was available for the fraudulent purpose alleged in the indictment must be averred. * * * *The same is true when the instrument is imperfect or incomplete and its real meaning and terms are not intelligible from its words and figures,* but are to be derived from extrinsic

facts, and its capacity to injure is dependent on such facts."

In 174 ALR 1329 is a collection of authorities in support of the fundamental proposition that:

> "The indictment must show that the instrument in question can be made available in law to work the intended fraud or injury; if such appears to be the case upon the face of the instrument, it is sufficient to set it out in the indictment; but if not, *the extrinsic facts in view of which it is claimed that the instrument is available for the fraudulent purpose alleged in the indictment must be averred.*"

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

RENDERED: October 15, 1965

COURT OF APPEALS OF KENTUCKY

RAYMOND T. DAVIS ..... *Appellant*

v.

COMMONWEALTH OF KENTUCKY ..... *Appellee*

APPEAL FROM JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, FIRST DIVISION
HONORABLE FRANK A. ROPKE, JUDGE

OPINION OF THE COURT BY JUDGE HILL

AFFIRMING

APPENDIX

This is an appeal from the Jefferson Circuit Court wherein the appellant, Raymond T. Davis, was sentenced to two year's confinement in the penitentiary for the offense of uttering a forged instrument in writing, as denounced by KRS 434.130. More specifically, the appellant presented a promissory note to the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky, (hereinafter referred to as Citizens) bearing the allegedly forged signatures of W. Ray Stark and Emma L. Stark, his wife.

In 1960, the appellant and Mr. and Mrs. Stark jointly formed a business corporation which was primarily financed by various bank loans. From time to time they would jointly execute promissory notes and obtain these bank loans by pledging Mr. Stark's securities as collateral.

In March of 1962, after some discussion, the Citizens Bank advised the appellant that they would con-

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AFFIRMING

This is an appeal from the Jefferson Circuit Court wherein the appellant, Raymond T. Davis, was sentenced to two year's confinement in the penitentiary for the offense of uttering a forged instrument in writing, as denounced by KRS 434.130. More specifically, the appellant presented a promissory note to the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky, (hereinafter referred to as Citizens) bearing the allegedly forged signatures of W. Ray Stark and Emma L. Stark, his wife.

In 1960, the appellant and Mr. and Mrs. Stark jointly formed a business corporation which was primarily financed by various bank loans. From time to time they would jointly execute promissory notes and obtain these bank loans by pledging Mr. Stark's securities as collateral.

In March of 1962, after some discussion, the Citizens Bank advised the appellant that they would con-

solidate these preexisting loans at various banks into one loan. For this purpose the Citizens Bank furnished the appellant with a blank promissory note form upon which the signatures of the Starks, as well as the appellant and his wife, were to be affixed. Subsequently, the appellant delivered this same note to Citizens, completely blank, except for the signatures of the appellant, his wife, and Mr. and Mrs. Stark.

It is the signatures of Mr. and Mrs. Stark on this note to Citizens which are alleged to be forgeries and which are the subject matter of the indictment. Later, the blanks in the note were filled in by a Citizens bank official, resulting in its completion as it appears in the indictment. As a result of this transaction between Citizens and the appellant, the other banks were paid in full and the various notes executed by the appellant and Mr. and Mrs. Stark at the other banks were cancelled.

The first important issue raised in this case is whether the note uttered by the appellant to Citizens Bank had legal efficacy and, therefore, the proper subject of forgery. The appellant contends that the answer to this question should be "No" since the note was not filled in with the particulars as to the date and amount. It is true that a writing must be of apparent legal efficacy or the foundation of a legal liability to be the subject of forgery. *Colson* v. *Com.*, 110 Ky. 233, 61 S.W. 46 (1901); *Com.* v. *Cochran*, 143 Ky. 807, 137 S.W. 521 (1911); *Carter* v. *Com.*, 311 Ky. 252, 233 S.W. 2d 900 (1949).

However, it is pointed out in the evidence that the appellant authorized a Citizens bank official to fill in the blanks when the amount of indebtedness was ascer-

tained. The Uniform Commercial Code [KRS 355.3-115 (1)], in stating that an incomplete instrument has legal efficacy after it is completed in accordance with the authority given, provides as follows:

> "When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any respect it cannot be enforced until completed, but when it is completed in accordance with authority given it is effective as completed."

In other words, the legal effect of giving an incomplete promissory note to another with the authorization to fill in the blanks is the same as delivering a complete instrument. It is the opinion of this Court that there is no merit in appellant's contention that the instrument in question was without legal efficacy and, therefore, not the proper subject of forgery.

It is next contended that the evidence was fatally at variance with the indictment. This is on the theory that the indictment was defective in that it should have stated all of the facts connected with the issuance of the note in order for there to be legal efficacy stated in the indictment. The appellant points out that it is absolutely undisputed that at the time of its utterance the note was completely blank in every particular with the exception of the signatures of the makers. However, as pointed out in the U.C.C., supra, the legal effect of giving the incomplete promissory note to the Citizens bank official with the authorization to fill in the blanks was the same as delivering a complete instrument, and this Court has stated in *Eldridge* v. *Com.*, Ky., 54 S.W. 7, 8, (1899) " * * * That an indictment should state

the facts constituting the defendant's guilt, but it has always been allowable to state them according to their legal effect." The appellant goes on to say that the variance between the proof and the indictment was misleading to the appellant in his defense. It is well settled that any variance between the indictment and the proof which misleads the accused in making or preparing his defense is fatal. *Miller* v. *Com.*, 234 Ky. 224, 275 S.W. 2d 957 (1930); *Braswell* v. *Com.*, Ky., 339 S.W. 2d 637 (1960). It is the opinion of this Court that the variance complained of was not such as to mislead the accused in making his defense.

The third contention is that the instructions of the court were erroneous because they did not properly relate to the proof introduced at the trial. The appellant's argument is that the trial court submitted a factual issue to the jury which was completely unsupported by the evidence. The appellant complains that the trial court instructed the jury that the appellant could be convicted if the jury believe beyond a reasonable doubt that he uttered "the note mentioned in the indictment and evidence in this case." This argument is predicated upon appellant's theory that the indictment erroneously alleged that the note in question was complete and valid at the time of its utterance. However, the argument here is the same as the arguments hereinbefore discussed concerning the sufficiency of the indictment, and it is the opinion of this Court that the answers are the same. The legal effect of giving the incomplete instrument to the Citizens bank official with the authorization to fill in the blanks was the same as delivering a complete instrument.

It is further argued that the court erred in refusing

to give a directed verdict for the appellant. This is on the theory that there was a complete absence of any proof whatsoever of an intent to defraud. The argument is that one cannot be convicted of uttering a forged instrument without proof that the instrument was in fact forged, and in order to prove the latter it must be shown that the person who actually signed the name had a fraudulent intent. As to whether the instrument was in fact forged, the evidence shows that the bank furnished the appellant with the blank promissory note form and that subsequently he delivered the same note form to the bank, completely blank, except for the necessary signatures. It is further shown in the evidence that the signatures of Mr. and Mrs. Stark, as testified to by a handwriting expert, were in fact forged; also Mr. and Mrs. Stark deny ever signing the note in question. However, the appellant goes on to argue that there could have been no intent to defraud because, under the circumstances, the appellant did not gain nor seek to gain anything whatsoever as a result of the alleged uttering.

It is well settled that an intent to defraud is an essential element of the offense of uttering a forged instrument, *Flaugher* v. *Com.*, Ky., 279 S.W. 2d 775 (1955), but the actual accomplishment of a fraud is not a necessary element of the offense, *Com.* v. *Fenwick*, 177 Ky. 685, 198 S.W. 32 (1917); *Fain* v. *Com.*, 287 Ky. 507, 154 S.W. 2d 553 (1941). In the case at bar, it is true that the appellant obtained no money or property from this transaction. However, this argument loses sight of the fact that the appellant had been directed to remove his business from the Liberty National Bank and pay off loans upon which he and

Mr. Stark were obligated to pay because of irregularities in the *appellant's* personal checking account. Thus, by consolidating these various loans into one loan from the Citizens Bank, the appellant could, and apparently did, receive some benefit from the standpoint of attempting to keep this knowledge that the Liberty Bank had from Mr. and Mrs. Stark. Furthermore, *Finley* v. *Com.*, Ky., 259 S.W. 2d 32 (1955), held that the forgery of a renewal note in order to get an extension of time was sufficient to show fraudulent intent.

The fifth contention relates to the admission of incompetent evidence. The appellant complains that the trial court committed reversible error in permitting the Commonwealth to introduce evidence of prior acts of misconduct. Mr. Stark testified to the following portions of the evidence:

"Q. 30. * * * Did you ever get anything from Mr. Davis for the money that was borrowed and turned over to him?
"A. Not a thing.

And again:

"Q. 52. How many meetings (of the WR&R Corporation) were ever held?
"A. Never a meeting.
"Q. 53. What assets do you know of that the corporation ever owned?
"A. It never owned any * * *.
"Q. 55. Did you ever do anything in this business venture other than supply the money?
"A. That's right."

In our opinion this evidence was so interwoven with the alleged offense that it should be considered competent as tending to show a motive, scheme or plan. *Miller* v. *Com.*, 301 Ky. 66, 190 S.W. 2d 864 (1945); *Hedger* v. *Com.*, 294 Ky. 731, 172 S.W. 2d 560 (1943). Furthermore, the appellant complains that the trial court should have admonished the jury as to the limited purpose for which this testimony could be received and considered, but the obvious answer here is that the appellant failed to request such an admonition.

The final contention is that the following interruptions and comments made in the presence of the jury by the trial judge during the cross-examination of the appellant by the Commonwealth exhibited disbelief in the appellant's testimony:

> "By the Court: Did you give him any collateral, Mr. Davis? Yes or no.
> "Witness: Outside of a note, no sir.
> "By the Court: *Now you know whether you did or you didn't. Either you did or you didn't?*
> "Witness: To my knowledge, I did not.
> "Mr. Burton: Objection.
> "By the Court: He knows what he did with it.
> "Mr. Burton: We object to the comments of the Court and we object to the constant badgering by the Commonwealth.
> "By the Court: Both of your objections are overruled.
> "Mr. Burton: Exceptions.
> "By the Court: *Just a minute. You know whether he asked you that or not.*
> "Witness: The notes, no sir.
> "By the Court: Answer yes or no."

It is the opinion of this Court that this contention is without merit because the appellant was very evasive in regard to many of his answers. The trial judge was only trying to get the appellant to give a responsive answer rather than showing a disbelief in appellant's testimony. This was not prejudicial. *Ragland* v. *Wickware,* 27 Ky. 530 (1830).

The judgment is affirmed.

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APPENDIX B

KENTUCKY REVISED STATUTES 434.130

"Any person who forges or counterfeits any writing in order to obtain fraudulently the possession of or to deprive another of any money or property, or to cause another to be injured in his estate or lawful right, or any person who utters and publishes such an instrument as true, knowing it to be forged and counterfeited, shall be confined in the penitentiary for not less than two years nor more than 10 years."

CONSTITUTION OF THE UNITED STATES AMENDMENT SIX

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

CONSTITUTION OF THE UNITED STATES AMENDMENT FOURTEEN, SECTION 1

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."